January 29, 2007

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Dear Ms. Pope:

We issue this opinion in response to your letter asking this Office to consider the constitutionality of section 5-31-620 of the South Carolina Code. From your letter, we understand you represent the Spartanburg Sanitary Sewer District (the "District") "which is in negotiations with the City of Spartanburg (the "City") for the acquisition of its collection lines." In addition, you informed us that the City of Chesnee is also in negotiations with the District to sell its sewer system. Thus, your request is prompted by the issuance of an opinion by this Office on November 8, 2006, in which we advised the City of Chesnee, in accordance with section 5-31-620, it must hold a referendum prior to the sale of its sewer system to the District.

In your letter, you raise concerns as to the constitutionality of section 5-31-620. Particularly, you argue the constitutionality of this provision comes into question, not because of the language contained in section 5-31-620, but because you believe the freeholder petition requirement contained in 5-31-640 of the South Carolina Code is unconstitutional. In your opinion, this provision "violates the equal protection clause of the fourteenth amendment . . . ." Furthermore, you argue this provision is not severable from section 5-31-620 and therefore, is inoperative making an election under this provision invalid.

Law/Analysis

As we determined in our November 2006 opinion, section 5-31-610 of the South Carolina Code (2004) gives cities and towns the authority to sell, convey, and dispose of their sewer systems. However, section 5-31-620 of the South Carolina Code (2004) requires the city or town seeking to dispose of its sewer system to hold a referendum prior to such a sale, conveyance, or disposal. Section 5-31-640 of the South Carolina Code (2004), which we are concerned within this opinion, provides as follows: "Before any election shall be held under the provisions of this article at least

twenty-five per cent of the resident freeholders of the city or town, as shown by its tax books, shall petition the city or town council that such election be ordered."

In your letter, you indicate your belief that this provision violates the Equal Protection Clause of the Fourteenth Amendment. You base your assertion in part on the United States Court of Appeals for the Fourth Circuit decision in Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978). In that case, the Court considered a South Carolina statute governing the annexation of property by a municipality. Id. In accordance with the annexation procedures, a petition must be signed by fifteen percent of the freeholders in the annexation area to initiate the annexation process. Id. at 188. In addition, upon certification of the petition, the resident freeholders in the annexation area must vote to approve the area to be annexed. Id. at 188-89. Finally, both the registered voters of the annexing municipality and the area to be annexed must hold referendums to approve the annexation. Id. at 189.

In its analysis of the "freeholder provision" under the Equal Protection Clause, the Court considered numerous court decisions striking down freeholder provisions because they restrict voting on bases other than residence, age, and citizenship in violation of the Equal Protection Clause. With regard to the South Carolina statute, the Court considered the county's argument that the referendum of the freeholders was not part of the election. Id. In response, the Court noted: "While the referendum in form may be a condition precedent to the actual election, in effect it grants to some individuals who are identified on the basis of ownership of realty the right to nullify a vote for annexation by the electorate at large." Id. In finding the freeholder provision in violation of the Equal Protection Clause, the Court stated: "once the right to vote is established, the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest." Id. at 190. However, the Court did not find a compelling state interest in this instance that justifies "an inequality in the franchise." Id. Nonetheless, the Court held the unconstitutional portions of the annexation statute were severable from the rest of the annexation statute and upheld the validity of the annexation. Id. at 191.

Subsequent to the Fourth Circuit's decision in Hayward, the South Carolina Supreme Court considered the same annexation statute considered by the Court of Appeals in Hayward in Fairway Ford, Inc. v. Timmons, 281 S.C. 57, 314 S.E.2d 322 (1984). The parties agreed that the provision requiring a vote of the freeholders violated the Equal Protection Clause, but disagreed as to whether this provision was severable from the other statutes governing annexation. The Court noted: "Severability is a question of state law. Accordingly, this court is not bound by and, in fact, refuses to follow the Hayward decisions." Id. at 57, 314 S.E.2d at 324. The Court set forth the following test for determining whether the constitutional portion of the statue is severable from the unconstitutional portion:

> "The rule is that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such character as that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder."

Id. (quoting Townsend v. Richland County, 190 S.C. 270, 280-81, 2 S.E.2d 777, 781 (1939)). The Court noted the Legislature's inclusion of the requirement that a majority of freeholders approve the annexation in eight of the annexation methods provided by the Legislature. Id. at 60, 314 S.E.2d at 324. Thus, the Court concluded the "obvious intent of the Legislature to require approval of freeholders is so dominant that it cannot be said that the statute, without the portion declared unconstitutional, would have been enacted without the freeholder approval requirement." Id. Accordingly, the Court found the constitutional provisions, allowing annexation upon approval by a majority to the registered voters in the area to be annexed and in the annexing city, are not severable from the unconstitutional freeholder provision. Id.

The Fourth Circuit again addressed the constitutionality of another freeholder provision in Muller v. Curran, 889 F.2d 54 (4th Cir. 1989). In that case, the Court scrutinized a Maryland law setting forth a three-step process for the incorporation of a municipality. Id. The Court described the process as follows:

> The first step requires a petition to the county council signed by at least 20% of the registered voters of the area to be incorporated and also by the owners of at least 25% of the assessed value of the real property within that area. The second step involves a decision by the county council, in its sole discretion, to submit the issue of incorporation to the voters of the area. The third step is an election in which all registered voters in the area can vote.

Id. at 55-56. The Court cited extensively to Hayward and found:

> The challenged Maryland procedure permits a popular vote to be blocked by property owners. That is so because the county council cannot schedule such a vote unless a given percentage of the property owners authorize it. That in and by itself offends equal protection principles unless a compelling state interest is present. No such interest has been shown in this case.

Id. at 56-57.

The United States District Court for the District of South Carolina came to the same conclusion as did the court in Muller in addressing a South Carolina municipal incorporation statute. Murray v. Kaple, 66 F.Supp.2d 745 (D.S.C. 1999). According to the Court, South Carolina's incorporation procedures were as follows:

> First, after the Office of the South Carolina Secretary of State determines the proposed area meets or is exempted from certain population and boundary requirements, representatives for the incorporation effort must submit a feasibility study to the Secretary of State for approval. S.C. Code Ann. § 5-1-30. Second, a petition setting forth the corporate limits and number of inhabitants of the affected area, and signed by fifty (50) qualified electors and fifteen percent (15%) of the freeholders residing within the proposed area must be filed with the Secretary of State. Id. § 5-1-40. Third, after approving the feasibility study and petition, the Secretary of State must commission three or more persons to conduct an election in which all registered voters of the proposed area are allowed to vote on the question of incorporation, as well as other municipal issues. Id. § 5-1-50.

Id. at 747. Relying primarily on Muller, the court determined: "any provision which furnishes a mechanism with which to block a vote impinges the guarantee of Equal Protection under the Fourteenth Amendment." Id. at 750. Ultimately, the Court concluded the statute is unconstitutional based on the fact that:

> There is no indication . . . that the Secretary of State would commission an election without the requisite percent of freeholder approval. To the contrary, the provisions setting forth the petition requirements and the Secretary's actions following receipt of the petition are phrased in mandatory language.

Id.

In addition to addressing the constitutionality of the freeholder provision, the District Court also considered the severability of this provision from the other provisions governing incorporation. The Court noted the similarities between the annexation statute considered in Timmons and the incorporation statute at issue in this case. Id. at 750-51. Furthermore, the Court stated if the freeholder provision were severed, the Legislature's intention that "a certain number of interested persons' desire for an incorporation vote" would not be served. Id. at 751. Additionally, the Court considered the fact that the Legislature proposed an amendment to the freeholder provision to require that the petition be signed by fifteen percent of the qualified electors. Id. Accordingly, the Court determined: "All of these considerations lead the court to conclude that the Legislature would not have passed the petition provision without the freeholder condition. Therefore, the statute is not severable." Id.

Before we consider the constitutionality of section 5-31-740, we must keep in mind that "[w]hen the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the Constitution." Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 78, 245 S.E.2d 117, 199-20 (1978). Moreover, we also acknowledge that "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Atty. Gen., February 12, 2001. Thus, our analysis as to the constitutionality of this and any other provision is limited to what we believe a court would conclude. Moreover, unless and until a court renders this provision invalid, it remains in full force and effect under the law.

In our review of section 5-31-640, we find it similar to the annexation and incorporation statutes struck down as unconstitutional by the Courts in Hayward and Murray. Section 5-31-640 requires at least twenty-five percent of the resident freeholders of a city or town to sign a petition before an election may be held allowing such a city or town to construct, purchase, sale convey or dispose the property listed in section 5-31-610. Thus, this provision affords property owners the opportunity to prevent these issues from being considered by the electorate. Like the statutes considered in Hayward and Murray, this statute appears to furnish "a mechanism with which to block a vote" to a certain classification of voters not based on residence, age, or citizenship. Murray, 66 F.Supp.2d at 750. Therefore, we believe this statute runs afoul of the guarantee of Equal Protection under the Fourteenth Amendment.

Despite our belief that section 5-31-640 impermissibly restricts the right to participate in the petition process to property owners, we must also consider whether such a restriction is justified by a compelling state interest. This task is difficult because we are not privy to all of the arguments that could be asserted with regard to state interests that may be served. Moreover, for purposes of this

opinion, we cannot speculate as to the arguments that may be asserted. Additionally, the determination of whether a compelling state interest exists to justify the inequity would involve the resolution of a factual issue, which is beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., June 27, 2006 (stating "this Office does not have the authority of a court, the Attorney General cannot investigate or determine facts."). But, assuming no compelling state interest exists, we believe a court would find section 5-31-640 in violation of the Equal Protection Clause of the Fourteenth Amendment and therefore, invalid.

If no compelling state interest exists rendering section 5-31-640 invalid, a court may then address whether section 5-31-620 is invalid as well. In view of the Supreme Court's analysis with regard to severability presented in Timmons, a court would consider whether section 5-31-640 is so connected with section 5-31-620 that these two provisions "'mutually depend upon each other as conditions and consideration for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void . . . .'" Timmons, 281 S.C. at 59, 314 S.E.2d at 324 ((quoting Townsend v. Richland County, 190 S.C. 270, 280-81, 2 S.E.2d 777, 781 (1939)).

Sections 5-31-640, 5-31-620, and the other provisions contained in article 7 of chapter 31 of title 5 of the South Carolina Code provide a mechanism by which cities and towns may construct, buy, operate, sell, and dispose of municipal utilities. However, by requiring a petition and an election prior to taking such actions by the cities and town, we believe the Legislature sought to ensure such actions are in the best interest of the city or town. In particular, with regard to the petition requirement, we believe, like the Court in Murray, that the Legislature intended to ensure interest in the proposed action prior to calling for a vote of the electorate. Accordingly, we believe the intention of the Legislature cannot be fulfilled with the absence of section 5-31-640. Thus, we opine that a court likely would find this provision not severable from section 5-31-620. Should a court reach this conclusion, it would thereby render section 5-31-620 unconstitutional.

Conclusion

Based on our analysis above, we believe a court would find the freeholder provision in section 5-31-640 of the South Carolina Code impermissibly restricts the right to vote. Such a restriction may only be overcome upon proof that it furthers a compelling state interest. The determination of whether a compelling state interest exists, is a factual matter, which only a court may decide. However, assuming no compelling state interest is found, we believe a court would determine section 5-31-640 runs afoul of the Equal Protection Clause of the Fourteenth Amendment. Furthermore, should a court make this determination, we also believe it would find this provision is not severable from section 5-31-620. Accordingly, we opine that a court also would rule section 5-31-620 unconstitutional. However, we caution, only a court may render a statute unconstitutional,

therefore sections 5-31-640 and 5-31-620 remain valid and enforceable until a court rules otherwise.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
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